

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO. 4:18-cr-00076-RH-CAS

JOHN THOMAS BURNETTE,

Defendant.

_____ /

DEFENDANT’S MOTION TO DISMISS THE INDICTMENT

The Defendant, JOHN THOMAS BURNETTE, by and through undersigned counsel and pursuant to Federal Rule of Criminal Procedure 12(b)(3), moves the Court to dismiss the indictment, and alleges:

1. Mr. Burnette is charged with participating in a racketeering conspiracy (Count One), extortion with respect to Company C (Count Two), honest services mail fraud with respect to Company C (Counts Three through Six), using facilities in interstate and foreign commerce to facilitate bribery in relation to Company C (Counts Seven and Eight), and making false statements to federal officers (Count Nine).

2. The second superseding indictment was returned by the grand jury on October 2, 2019.

3. The second superseding indictment alleges the following:

10. **JOHN THOMAS BURNETTE (“BURNETTE”)** was a businessman and real estate developer in the City of Tallahassee and was an associate of [Scott Charles] Maddox and [Janice Paige] Carter-Smith. **BURNETTE** bribed Maddox to take official actions favorable to **BURNETTE’s** business interests, and assisted Governance with obtaining

bribes from a new client that sought to develop projects in the City of Tallahassee.

. . . .

13. Maddox and Carter-Smith controlled and operated the Enterprise. Maddox was the leader of the Enterprise, and directed other members and associates of the Enterprise in carrying out the unlawful activities and other activities in furtherance of the Enterprise's affairs. Under the direction of Maddox, Carter-Smith was a member of the Enterprise and also directed associates of the Enterprise in carrying out the unlawful activities and other activities in furtherance of the Enterprise's affairs. **BURNETTE** associated with the Enterprise and participated in the operation of its affairs, including bribing Maddox and convincing other individuals to make bribe payments to the Enterprise for projects needing approval in the City of Tallahassee or Leon County.

(Doc 145 - Pgs 4-6).

■ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

¹ [REDACTED]

[REDACTED]

[REDACTED]

5. After the grand jury returned the prior superseding indictment charging Mr. Burnette, the Government provided an excerpt from a report submitted by former FBI Special Agent Josh Doyle (i.e., an excerpt from a report with Bates number DOJ_092850 to DOJ_092851). The excerpt from former Special Agent Doyle's report stated the following:

As it relates to Burnette, he has met with the UCEs on multiple occasions, resulting in numerous recorded conversations. Burnette admitted to the UCEs that he has bribed Maddox for assistance with most of the developments Burnette has been engaged in for the past several years. In fact, Burnette is currently paying Maddox \$15,000 a month, via a company called Governance Services LLP, as part of a bribe for a recently completed project.

(Emphasis added) (excerpt attached as Exhibit 2).² Former Special Agent Doyle's report was written on January 22, 2017. This report provided an update to FBI headquarters and sought \$7M in show funds to allow the Government's undercover agents to demonstrate they were ready to proceed with a proposed real estate development with Mr. Maddox and Mr. Burnette. Central to the FBI's application for the show money is a false statement that Mr. Burnette was paying Mr. Maddox \$15,000 a month via Governance Services, LLP.

6. In addition to excerpts from FBI reports, the Government has also provided undersigned counsel with audio recordings containing conversations between undercover agents and Mr. Burnette. After reading the extremely damaging statements set forth in the excerpt from former Special Agent Doyle's report, undersigned counsel reviewed the audio recordings to confirm that such admissions were made. However, no such admissions

² The Government concedes that the excerpt included in Exhibit 2 is an accurate excerpt from Former Special Agent Doyle's report. Because the report contains other sensitive third-party information, the Government has requested undersigned counsel to attach only the relevant excerpt to this motion.

appeared in any of the recordings provided by the Government to undersigned counsel.

Accordingly, undersigned counsel contacted the Government via email to request the audio recording(s)/evidence in question:

From: Tim Jansen
To: Simon Cataldo
Sent: Tuesday, July 16, 2019 4:18 PM

Simon,

In your July 9, 2019 email you noted that you would accept service for any government employees who we wish to serve with trial subpoenas. We would like to subpoena the government employee who authored the documents in "FBI Documents Redacted" which ranges from DOJ-0925811-09286001. Specifically, we would like to subpoena the author of the statements in pages DOJ-0928580-81.

Please let us know if you will provide the name of the government employee who authored all of the documents in "FBI Documents Redacted" and specifically the author of the pages listed above. It appears the authors names and the dates of these statements were all redacted, will the Government agree to unredacted the dates and authors of these documents? Tim.

. . . .

From: Tim Jansen
To: Peter Nothstein
Sent: Tuesday, July 23, 2019 5:12 PM

Peter,

Yesterday at 7:17 p.m. you requested we provide the bate stamps for the documents we were seeking additional information on and you would attempt to provide an answer today. We provided those bate numbers last night and did not receive a response today.

I wanted to forward you the below email which shows we provided the bate stamp range back on July 16, 2019 and got no response from the Government. My July 22, 2019 email was merely a follow up requesting this same information and requesting you direct us to the documents in discovery which support or were the basis for the unknown authors allegations. While

I referred to them as 302's, they appear so be some sort of FBI document but are so redacted that we cannot even determine if they are on form 302.

Please let me know if any other additional information is needed and when the Government intends to provide a response. Our alternative would be a motion to compel and request the Court conduct an in camera review of the documents.

Thank you,
Tim

. . . .

From: Peter Nothstein
To: Tim Jansen
Sent: Tuesday, July 23, 2019 6:07:39 PM

Tim, we are aware that you are looking for the authors of the FBI reports for which you provided Bates numbers. We will provide you with the authors of those documents shortly; we are just confirming the names of the authors and whether or not they are still employed by the FBI. We should be able to send those names to you shortly.

My email yesterday was referencing the other materials you asked about. Specifically, you asked about "one 302 it claims that Mr Burnette was paying \$15,000 per month to Governance and that he pays bribes to Scott Maddox." Do you have the Bates number for this FBI 302? You also ask about "Tango 1" and "Chris Lancaster." Can you let us know in which documents these names are referenced? That will greatly assist us in resolving your questions.

Best regards,
Peter

. . . .

From: Tim Jansen
To: Peter Nothstein
Sent: Tuesday, July 23, 2019 7:37 PM

Peter,

Regarding the \$15,000, that is not within a Fbi 302 it appears in the redacted page DOJ 0928581. What we are seeking is the date of the report, who authored the report, and the evidence and the location in Discovery that supports the serious allegations contained therein.

Regarding Chris Lancaster and Tango 1 you can find them in DOJ 33 file

number 1 and DOJ 106 file number 1. Additionally, it is our understanding through our sources that Chris Lancaster was the other individual operating the front business of Butler Solutions Team.

Thanks Tim

....

From: Peter Nothstein

To: Tim Jansen

Sent: Wednesday, July 24, 2019 5:31 PM

Tim, I received your voicemail and I'm about to board a flight, but I wanted to get this email to you before I did. If there's anything else we need to address, please let me know and I'll call you in the morning. I believe we have the answers to your questions.

1. To answer your question about the authors of specific redacted documents:
 - a. SA Josh Doyle authored the following documents:
DOJ-0928511-001-0928518; DOJ-0928521-DOJ-0928532;
DOJ-0928533-DOJ-0928535; DOJ-0928536-001-0928547;
DOJ-0928548-DOJ-0928563; DOJ-0928564-DOJ-0928574;
DOJ-0928575-DOJ-0928576; DOJ-0928577-DOJ-0928579;
DOJ-0928580-DOJ-0928591;
 - b. SA Evan Hurley authored the following documents:
DOJ-0928599-DOJ-0928600; DOJ-0928601-DOJ- 0928602
 - c. SA Michael Wiederspahn authored the following documents:
DOJ-0928592-DOJ-0928595; DOJ-0928596-DOJ-0928598
 - d. SA Jerry Bermudez authored the following document:
DOJ-0928519-001-0928520
2. We are willing to accept service for current FBI employees. SA Hurley and Wiederspahn are current FBI employees, but SA Doyle is no longer employed by the FBI, and SA Bermudez has passed away. In accepting service, the government is not waiving any objections to the testimony or any requested documents, including objections or motions to quash based on the Touhy regulations.
3. Regarding your question about the reference to \$15,000 in DOJ 0928581 and the statements in DOJ_REC_033 and DOJ_REC_106,

we believe those records speak for themselves. Furthermore, we note that DOJ_REC_033 and DOJ_REC_106 are not listed on our exhibit list provided on July 1.

Please let us know if you have any further questions.

Best regards,
Peter

....

From: Tim Jansen
To: Peter Nothstein
Sent: Wednesday, July 24, 2019 5:59 PM

Peter, I appreciate your response to our inquiry on DOJ 0928581. However, we also asked for the date in which subject document was created by Former Josh Doyle. Can you please provide the date the document was prepared? Thanks for your timely response to this issue.

....

From: Peter Nothstein
To: Tim Jansen
Sent: Thursday, July 25, 2019 1:17:42 PM

Tim, that document was authored on October 23, 2015.

Best regards,
Peter

....

From: Tim Jansen
To: Peter Nothstein
Sent: Thursday, July 25, 2019 3:40 PM

Peter,

Your response has created even more confusion. Please let me know if anything below is incorrect as we are attempting to clear up our confusion.

The Government's position is that Former FBI agent Josh Doyle authored 092851 on 10/23/15. 092851 contains a statement from Mr. Doyle that Mr. Burnette made an admissions to the UC's regarding \$15,000 per month bribe payments for recently completed projects. When asked what evidence supports this allegation by Mr. Doyle the Government directs us to DOJ-33

which are recordings from 6/22/16 and DOJ-106 which are recordings from 6/21-22/16.

How can the underlying basis of Mr. Doyle's statement that Mr. Burnette made an admission be from the recordings that did not exist at the time Mr.

Doyle wrote the statement?

. . . .

From: Peter Nothstein
To: Tim Jansen
Sent: Friday, July 26, 2019 11:05 AM

Tim, please accept my apologies; I transposed the digits in the document you asked about and gave you the date for DOJ-0928521. The document you asked about, DOJ-0928591, was authored on January 22, 2017. Regarding the \$15,000, I believe you misunderstood my previous email. I was not directing you to DOJ_REC_033 or DOJ_REC_106 for support for any statements in DOJ-0928591. You had asked about Chris Lancaster and "Tango 1" and directed us to those two recordings when I asked where you saw those two names. My response to you stated simply that DOJ-0928591, DOJ_REC_033, and DOJ_REC_106 each speak for themselves and we do not have additional information to provide about "the \$15,000," Chris Lancaster, or "Tango 1."

Best regards,
Peter

. . . .

From: Tim Jansen
To: Peter Nothstein
Sent: Friday, July 26, 2019 11:12 AM

Peter,

Are you willing to provide DOJ-0928591 with the author's name and date not redacted? Please let us know asap.

. . . .

From: Peter Nothstein
To: Tim Jansen
Sent: Friday, July 26, 2019 4:06 PM

Tim, attached to this email is a copy of DOJ_0928580 through DOJ_0928591

with the date and author's name unredacted (on page DOJ_0928580). As to your request for other 302s or other documents, we have already provided the discovery to you. Regarding your question about consultation, I am not clear on what motion you are considering. We are not withholding any documents you are asking for. If I am misunderstanding what you are asking, please let me know.

Best regards,
Peter

....

From: Tim Jansen
To: Peter Nothstein
Sent: Friday, July 26, 2019 4:15 PM

Peter, as you know you have provided nearly 1 million bate stamped materials. Can you please direct us to the pertinent bate stamped documents or the 302's which document this alleged confession by Mr. Burnette? I assume such evidence would have been contemporaneously documented in a 302.

....

From: Tim Jansen
To: Peter Nothstein
Sent: Tuesday, July 30, 2019 5:01 PM

Peter,

I'm following up on our Friday July 26, 2019 email requesting the pertinent bate stamped documents or the 302's which document this alleged confession by Mr. Burnette? We have not received any response for the Government on this issue.

Additionally, at this point due to redactions we are unable to determine what this 12 page document is called. (DOJ-0928580-0928591). Are you willing to provide the unredacted title or heading that will identify this document?

....

From: Peter Nothstein
To: Tim Jansen
Sent: Thursday, August 1, 2019 5:29 PM

Tim, we have provided all of the discoverable reports, and more. We do not

have more to provide at this time. We also do not have any additional information to provide you on DOJ-0928580-0928591.

Best regards,
Peter

(Emphasis added) (attached as Exhibit 3).

7. Less than a week after the August 1, 2019, email, the Government sent an email to undersigned counsel stating that the information contained in the excerpt from former Special Agent Doyle's report (i.e., Bates number DOJ_0928580 to DOJ_0928591) was a "mistake":

From: Tim Jansen
To: Peter Nothstein
Sent: Wednesday, August 7, 2019 2:41 PM

Peter, I would like to confirm and put in writing your response to our previous request regarding a report written by former FBI agent Josh Doyle. At your request, we met yesterday in the small conference room outside Judge Hinkle's courtroom immediately after the Maddox and Smith change of pleas. You stated that the report was false and was a mistake by Agent Doyle regarding statement claiming Mr Burnett admitted paying \$15,000 per month to Maddox through Governance. You also indicated there is no evidence in the Government's possession that would establish such a false statement/confession. In addition, you added that Doyle was confused by other information on a separate investigation. Finally, you indicated that this is the Government's final position regarding this issue and that you will not provide any further evidence/information. Please confirm that I have properly memorialized the meeting, conversation between the parties, and the Government's final response on this matter.

. . . .

From: Peter Nothstein
To: Tim Jansen
Sent: Wednesday, August 07, 2019 4:39 PM

Tim, you are correct that we had a brief informal meeting at the time and location you describe, and that one matter we discussed briefly was SA Doyle's report with Bates number DOJ_092850 to DOJ_0928591. On that issue, what we told you was that 1) *we believe SA Doyle made a mistake in*

his report; and 2) that we do not intend to introduce evidence at trial that Mr. Burnette stated that he paid \$15,000 in bribes per month to Mr. Maddox, as reflected in the report (DOJ_092850 to DOJ_0928591). You are correct that we do not have any additional documents or information to provide to you on this specific topic at this time.

Best regards,
Peter

(Emphasis added) (attached as Exhibit 4).

8. Undersigned counsel are limited in their ability to subpoena former Special Agent Doyle in order to determine the magnitude of his “mistake.” *See United States ex rel. Touhy v. Regan*, 340 U.S. 462 (1951). However, former Special Agent Doyle has talked about the investigation in this case in other contexts – most notably during his interview with The Florida Bar. During his interview with The Florida Bar, former Special Agent Doyle stated the following:

I’ve had – as a matter of fact, I’m concluding a case now in which we have an investigative team of about 25 people that I’ve assembled that includes agents, undercover employees, folks that focus on technology to help us gather evidence, analysts, um, you know, we’ve had a half-million-dollar budget that we’ve had to justify and obtain the money. We’ve had to keep, obviously, a correct accounting of that, prepare for audits, had to undergo audits.

. . . .

. . . I’ve been hand-selected to work on some of the most high-profile cases in this country – I mean, subjects who would be instantly recognizable to everybody in this room, and I’ve been picked to handle those cases or to receive complaints about it, you know, such information because of my ability to keep confidences, because of my ability not to engage in gossip. So I think that’s a set of pertinent facts.

(Transcript of former Special Agent Doyle’s interview with The Florida Bar at pgs. 4, 9) (attached as Exhibit 5).

9. After receiving the August 7, 2019, email from the Government, undersigned counsel retained James J. Wedick, a former FBI agent who has testified numerous times as an expert witness on the subject of FBI policies and procedures. Mr. Wedick has reviewed the information cited above and he formed the following conclusions in his report:

The communication authored by SA JOSHUA E. DOYLE, dated January 22, 2017, in which DOYLE states [on page 2], “BURNETTE is currently paying MADDOX \$15,000 a month, via a company called GOVERNANCE SERVICES LLC, as part of a bribe for a ... completed project.” the writer *opines* is an electronic communication seeking to “renew” and/or “update” a Group I Undercover [UC] Operation concerning a corruption investigation involving SCOTT CHARLES MADDOX, JANICE PAIGE CARTER-SMITH and JOHN THOMAS BURNETTE. In the body’s text the document makes clear the communication is an FD-997.

Initiated in 2015, the writer states Group I UC Operations are required to be “renewed/updated” every six-months.

Besides summarizing the investigation, talking about the ongoing efforts of three undercover agents, the document makes clear agents want “\$7 million in “show” funds. DOYLE states the “show” money will be used to argue that agents are ready to go forward with MADDOX on a proposed development, contingent upon him putting up a \$2 million guarantee. The request for show money totaling \$7 million makes clear the document was directed to FBIHQ.

The writer *opines* [stating in the report], “BURNETTE is currently paying MADDOX \$15,000 a month, via a company called GOVERNANCE SERVICES LLC, as ... a bribe for a ... project,” is probably the singular most important piece of information in the document since it demonstrates to officials BURNETTE and MADDOX had a “corrupt” relationship, “independent” of the FBI. As a defense strategy, lawyers will place blame for an individual’s criminal conduct on the FBI’s Undercover Operation. For this reason, its important agents identify and charge criminal conduct independent of any undercover operation.

Because corruption investigations are “highly” scrutinized by FBIHQ, the writer *opines* information concerning BURNETTE and MADDOX’s suspected criminal conduct should have been widely known and discussed by agents working the investigation.

The *writer* *opines* UCE concerns about needing show funds/wanting to develop a solid relationship with MADDOX doesn’t make sense given the fact agents were already making “bribe” payments MADDOX. The writer *opines* the two premises are not consistent with one another and might be the reason FBIHQ officials became circumspect about DOYLE’s reporting/leaving officials to discover the remarks he made about

BURNETTE paying MADDOX \$15,000/saying they were “not” true and reporting same.

But suggesting the matter was merely a mistake further complicates the matter leaving the writer to suspect something more sinister was at play. It was “not” a typo, or an inadvertent statement made by another defendant and misidentified. Saying the incident didn’t happen, the writer *opines* DOYLE fabricated the story. Information reported in an FD-997 the writer *opines* is information whose origins were first reported on other documents, e.g. handwritten notes, typed interviews and/or recorded electronic conversations.

NOHTHSTEN now states information reported by DOYLE was not “true” and denies it can be found anywhere in the government’s records. He said DOYLE just made the remarks up concerning BURNETTE’s confession/typing them into the document. The writer *opines* just making up information is a serious offense and per chance he did make things up the writer doesn’t doubt he made other things up/calling into the question the integrity of the investigation.

. . . Contributing to the writer’s opinion, he states in NOTHSTEIN’s email to JANSEN, dated August 7, 2019, NOTHSTEIN states when asked about DOYLE’s comment about BURNETTE’s reported confession, he doesn’t say he asked DOYLE about the remark, but rather he “believes” DOYLE will say he made a “mistake.” Not in a position to ask DOYLE, the writer *opines* something seriously must have happened in the investigation causing the two men now not to be able to speak. Add NOTHSTEIN’S comment BURNETTE’s confession is “not” true, the writer *opines* he’s left to believe there are other lapses in the investigation that have yet to be discovered and/or disclosed. The write *opines* he thinks DOYLE fabricated BURNETTE’s confession and made other misrepresentations that seriously call into question the integrity of case.

Information indicating someone has made admissions and/or statements suggesting they are making illegal payments to a government official, paying “bribes,” would be the subject of testimony, and according to FBI Policy & Procedure, must be documented in an FD-302. FBI Policies & Procedures mandate that any statements made indicating a person’s guilt or innocence, would be the subject of testimony and must documented in the form of an FD-302. Additionally, any written notes detailing conversations and observations about someone making bribe payments must be also preserved and filed in the 1A section of any file. And, likewise, any electronic recording made reflecting someone making admissions about a “bribe” payment must be documented and preserved in the 1B section of any file.

For information and guidance conducting Bureau investigations and administrative procedure, FBI agents are instructed to read the FBI’s Manual of Investigative Operations and Guidelines [MIOG]; Manual of

Administrative Operations and Procedures [MAOP]; and the FBI's Legal Handbook for Special Agents [Handbook].

(Emphasis added via bold font) (attached as Exhibit 6).

[REDACTED]

Discovery provided to undersigned counsel by the Government reveals that on October 4, 2016, "UC-4180" directly asked Scott Maddox about alleged payments from Mr. Burnette and the following occurred:

UC-4180: J.T. only pays you 15 he told me.

SCOTT MADDUX: He don't pay me that.

UC-4180: He told me he pays you 15 a month, not you.

SCOTT MADDUX: I'm pure as a Baptist (inaudible) fucking (inaudible). I live at the – for the cross.

October 4, 2016, transcript at pg. 20 (excerpt attached as Exhibit 7). The following day (October 5, 2016), "UC-4180" was talking to Mr. Burnette and he confirmed to Mr. Burnette that Mr. Maddox had denied that Mr. Burnette was paying Mr. Maddox \$15,000 a month:

So, [Vancore Jones] are the ones you pay 15,000 a month. Because when I was talking to Maddox about it last night, I said: where do we get this thing going? He said: "\$20,000 a month." I said, I said: "Bullshit." I said: "I know J. T., he pays you \$15,000 a month." *He said, he said: 'Nah, J.T. doesn't pay me anything.'*

October 5, 2016, transcript at pg. 41 (emphasis added) (excerpt attached as Exhibit 8). Yet more than three months later, former Special Agent Doyle wrote the January 22, 2017, report

and claimed that Mr. Burnette “admitted” that “he has bribed Maddox for assistance” with his developments in the past and that Mr. Burnette “is currently paying Maddox \$15,000 a month, via a company called Governance Services LLP, as part of a bribe for a recently completed project” – even though three months earlier (1) Mr. Maddox *denied* being paid \$15,000 a month by Mr. Burnette and (2) “UC-4180” *confirmed* the denial. Notably, the day after former Special Agent Doyle authored the report (i.e., January 23, 2017), former Special Agent Doyle and/or the undercover agents sent \$10,000 of Government undercover funds to Janice Paige Carter-Smith (as documented on page 52 of the prior superseding indictment). (Doc 54 - Pg 52) (“Count Twenty-five – January 23, 2017 – \$10,000 check sent through the U.S. Postal Service”). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Notably, the two recordings from October 4-5, 2016 (quoted above) were part of the handful of audio recordings that were transcribed by the Government. As explained above, these recordings contain *exculpatory* statements refuting any alleged confession by Mr. Burnette.

12. Other documents produced by the Government in discovery call into question the Government’s assertion that former Special Agent Doyle simply “made a mistake.” DOJ-0927061 is a chart that was prepared on November 3, 2016, by Deborah Kelly – the Government’s forensic accountant (attached as Exhibit 9). The chart documents all of the

payments from Mr. Burnette's related businesses to Maddox/Carter-Smith/Governance. [REDACTED]

[REDACTED]
[REDACTED].³ Moreover, "DOJ-0928822" (a portion of which is attached as Exhibit 12) is a chart disclosed in the Government's discovery log as "Capital Currency Chart." This zoomed-in section of the chart shows that it was created on August 24, 2018 by Dawn Mitchell (i.e., the chart was not created by former Special Agent Doyle). This zoomed-in section of the chart says "Burnette pays Maddox \$15,000 a month via Governance Services LLC as part of a bribe for a recently completed project."

13. In sum, the defense asked the Government about former Special Agent Doyle's statement and the Government responded that the statement speaks for itself. But when the defense pressed the Government on the statement because there is no evidence to support the statement, the Government responded that former Special Agent Doyle simply "made a mistake" in his report. But the Government has refused to provide any information about how this "mistake" could have been made. And further investigation has now established that the "mistaken" statement appears in a summary case chart prepared by a different author *a year later in 2018*. The existence of the statement by another author in 2018 calls into question the Government's assertion that former Special Agent Doyle simply "made a mistake." [REDACTED]

³ [REDACTED]
[REDACTED] "DOJ-0927058-61 Produced as FD-1057 Oglesby Interview.pdf" (attached as Exhibit 11) is a set of four documents that were utilized during the interview. The four documents include Ms. Kelly's check chart and the hand written notes of Special Agent Hurley's interview with Ms. Oglesby. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

15. One does not need to speculate to reach the logical conclusion that information stemming from former Special Agent Doyle's false report interfered with the independent function of the grand jury.

16. Mr. Burnette was prejudiced by this conduct.⁴

⁴ During his interview with The Florida Bar, former Special Agent Doyle was asked what his "toughest day" has been as an FBI agent, and he said the following:

PANEL MEMBER: What was the toughest day on either as an FBI agent or as a lobbyist, and why was it tough and what did you do about it?

MR. DOYLE: That's a great question.

PANEL MEMBER: That's a good question.

MR. DOYLE: I think the toughest day – I think the toughest day, I don't know one – I'm going to give you a category, if that's okay, not one specifically. It is always a tough day when, after a long investigation in which you have invested a substantial amount of time, energy, intellectual capacity, you built a team, you spent a lot of money, taxpayer money, you know, many of these investigations I do over two or three years, when it comes time to approach the subject and – if you get that far – and you do make that contact and things don't go that way. The subject won't speak, or you quickly realize that, you know, the subject is making exculpatory comments that are not going to be terribly helpful in court, and then –

PANEL MEMBER: Exculpatory?

MR. DOYLE: Exculpatory. And then you go back, and you talk to the prosecutors, and you realize that the likelihood of this being prosecuted is diminishing by the minute, that's a frustrating day. And it's frustrating just because you've had so much time and effort involved in it.

(Transcript of former Special Agent Doyle's interview with The Florida Bar at pgs. 25-26).

[REDACTED]

[REDACTED]

WHEREFORE, for the reasons set forth above and within the accompanying Memorandum of Law, JOHN THOMAS BURNETTE requests that the second superseding indictment be dismissed in its entirety.

MEMORANDUM OF LAW

To protect the rights contained in the Fifth Amendment, “federal courts have a supervisory power over the administration of justice to regulate the manner in which grand jury investigations are conducted.” *United States v. Pabian*, 704 F.2d 1533, 1536 (11th Cir. 1983) (internal quotations omitted). Furthermore, “[i]f the court is to exercise its supervisory power . . . it must find not only the presence of irrelevant evidence but also an abuse of the grand jury process associated with that evidence, such as inappropriate conduct on the part of the government.” *United States v. DiBernardo*, 775 F.2d 1470, 1477 (11th Cir. 1985).

Courts have consistently recognized that dismissal of an indictment is proper when false testimony is presented to a grand jury. *See, e.g., United States v. Hogan*, 712 F. 2d 757 (2d Cir. 1983) (dismissing indictment based on misconduct including introducing false and misleading testimony, using hearsay, and making inflammatory remarks). In *Hogan*, the Second Circuit Court of Appeals stated the following:

The grand jury convenes as a body of lay persons acting in secret, unfettered by technical rules of procedure or evidence. *Costello v. United States*, 350 U.S. 359, 362 (1956). Charged to indict no one on account of prejudice or to refuse to indict anyone as a special favor, this bulwark against Star Chamber proceedings in England was believed so essential to basic

liberties that it was incorporated in the Fifth Amendment to the United States Constitution. *See id.* That Amendment commands that “[n]o person shall be held to answer a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”

Interposing a grand jury between the individual and the government serves the intended purpose of limiting indictments for higher crimes to those offenses charged by a group of one’s fellow citizens acting independently of the prosecution and the court. *See Stirone v. United States*, 361 U.S. 212, 218 (1960). In this independent position, a grand jury performs two distinct roles. It serves as an accuser sworn to investigate and present for trial persons suspected of wrongdoing. At the same time – and equally important – it functions as a shield, standing between the accuser and the accused, protecting the individual citizen against oppressive and unfounded government prosecution. *See United States v. Calandra*, 414 U.S. 338, 342-343 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972).

It is true of course that prosecutors, by virtue of their position, have gained such influence over grand juries that these bodies’ historic independence has been eroded. 8 R. Cipes, J. Hall, M. Waxner, Moore’s Federal Practice ¶ 6.02[1] at 6-19-6-23 (2d ed. 1982). After all, it is the prosecutor who draws up the indictment, calls and examines the grand jury witnesses, advises the grand jury as to the law, and is in constant attendance during its proceedings. Nonetheless, there remain certain limitations on the presentation that a prosecutor may make to the grand jury. *See, e.g., United States v. Ciambrone*, 601 F.2d 616, 623 (2d Cir. 1979) (prosecutor may not mislead grand jury or engage in fundamentally unfair tactics before it). In fact the gain in prosecutors’ influence over grand juries is all the more reason to insist that these limitations be observed strictly. Due process considerations prohibit the government from obtaining an indictment based on known perjured testimony. *See United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974). Courts have also held that a prosecutor may not make statements or argue in a manner calculated to inflame the grand jury unfairly against an accused. *See, e.g., United States v. Serubo*, 604 F.2d 807, 818 (3d Cir. 1979). Under the applicable guidelines prosecutors have an ethical obligation strictly to observe the status of the grand jury as an independent legal body. *See American Bar Association, Standards For Criminal Justice Standard 3-3.5 at 3•48* (2d ed. 1980); *United States Attorney’s Manual 9-11.015* (August 17, 1978). In short, a prosecutor as an officer of the court is sworn to ensure that justice is done, not simply to obtain an indictment.

Id. at 759-760. The Second Circuit then explained:

The law of this Circuit is that dismissal of an indictment is justified to achieve either of two objectives: to eliminate prejudice to a defendant; or, pursuant to our supervisory power, to prevent prosecutorial impairment of the

grand jury's independent role. Viewing the above-mentioned instances of conduct cumulatively, *see United States v. Samango*, 607 F.2d 877, 884 (9th Cir. 1979); *United States v. Roberts*, 481 F. Supp. 1385, 1389 (C.D. Cal. 1980), we believe that the latter function is implicated here.

Id. at 761 (some citations omitted). Ultimately, the Second Circuit in *Hogan* concluded that the indictment must be dismissed – due, in part, to the presentation of false testimony to the grand jury:

[T]he DEA agents' false testimony to the grand jury on the issues of predisposition and inducement is most disturbing. Although the government was not required to anticipate a defense of entrapment and introduce evidence of predisposition, having elected to do so it was duty bound not to introduce false and misleading testimony. While the factual misstatements in the agents' testimony may have been inadvertent, as the government now argues, the fact remains that the appellants were prejudiced by the misstatements of important facts and the grand jury's independent role was impaired. *See Samango*, 607 F.2d at 882 (“Although deliberate introduction of perjured testimony is perhaps the most flagrant example of misconduct, other prosecutorial behavior, even if unintentional, can also cause improper influence and usurpation of the grand jury's role.” (footnote omitted)); *United States v. Asdrubal-Herrera*, 470 F. Supp. 939, 943 (N.D. Ill. 1979). Regardless of the government's intent, we believe that the grand jury was probably misled by this presentation.

Id. at 761-762 (emphasis added). *See also United States v. Lawson*, 502 F. Supp. 158 (D. Mary. 1980) (granting motion to dismiss indictment where Government's presentation of evidence to the grand jury was deliberately misleading and calculated to create a false impression); *United States v. Roberts*, 481 F. Supp. 1385 (C.D. Cal. 1980) (granting motion to dismiss indictment due to prosecutorial misconduct during grand jury proceedings).

Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), established the standard for dismissing an indictment based on error in a grand jury proceeding. The Supreme Court held in *Bank of Nova Scotia* that a district court is bound by the doctrine of “harmless error” and may not dismiss an indictment without making a factual finding that the defendant was

prejudiced. *See id.* at 255. To find prejudice, the district court must determine if the violation substantially influenced the grand jury’s decision to indict, or that there is “grave doubt” that the decision to indict was free from the substantial influence of the false testimony. *See id.* at 256 (citing *United States v. Mechanik*, 475 U.S. 66 (1986)).

If not evident based on the attached exhibits, Mr. Burnette is prepared to make a showing of prejudice during an evidentiary hearing. *See also United States v. Soberon*, 929 F.3d 935, 941 (3d Cir. 1991) (“If the district court could have formed a reasonable suspicion that perjured testimony was presented to the grand jury, the proper course would have been to hold an evidentiary hearing on the issue.”).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Based on undersigned counsel’s review of the discovery provided by the Government, it appears the Government spent significant resources in 2017 to subpoena and review all banking and business records of Mr. Maddox, Mr. Burnette, and Governance.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Without knowing the true origin of former Special Agent Doyle's false statement, it is undisputed that the Government (1) was informed by Mr. Maddox on October 4, 2016, that Mr. Burnette does not pay him; (2) received confirmation on October 5, 2016, that Mr. Burnette does not pay Mr. Maddox; and (3) was aware that no business or bank records corroborated the allegation – [REDACTED]

[REDACTED]

[REDACTED] When questioned about former Special Agent Doyle's statement, the Government responded "we believe SA Doyle made a mistake in his report. [REDACTED]

[REDACTED] ignores that the false statement was utilized in other Government documents, ignores that the "mistake" may have been used to obtain authorization to continue the investigation (including the sending a check the very next day), ignores that a false confession in a document seeking to use \$7M in undercover funds is not a document in which agents make mistakes, and ignores that since making the "mistake," former Special Agent Doyle held himself out publicly as the person "handpicked" to handle this most high-profile case and as someone who does not inadvertently makes such "mistakes." [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Accordingly, for the reasons set forth above, undersigned counsel request the Court

to:

- set this motion for an evidentiary hearing. *See Lawson*, 502 F. Supp. at 160-161 (“This case is before the court on defendants’ motion to dismiss the indictment against them on the ground of alleged grand jury abuse. A hearing was held on September 18, 1980, and the parties subsequently submitted supplemental memoranda. Having reviewed the materials submitted by the parties and the testimony adduced at the hearing, the court concludes that the indictment against defendants Lawson and Lane should be dismissed, without prejudice.”) (footnotes omitted);
- conduct an in camera review of redacted FBI documents “DOJ-0928511-DOJ-0928604” to determine if other *Brady*⁵ material was redacted or whether this false allegation was used in another authorization;⁶

⁵ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁶ Mr. Burnette intends to address his *Brady* claim at the evidentiary hearing. Former Special Agent Doyle is listed on the Government’s most-recent witness list. In *Stephens v. Hall*, 407 F.3d 1195, 1203 (11th Cir. 2005), the Eleventh Circuit Court of Appeals confirmed that the prosecution’s *Brady* “duty covers ‘[i]mpeachment evidence . . . as well as exculpatory evidence.’” (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)). In order to properly “impeach” former Special Agent Doyle concerning the alleged “mistake” in his report, Mr. Burnette must be afforded an opportunity to investigate the origins of the alleged “mistake” (and specifically, which undercover employees told former Special Agent Doyle about the purported \$15,000 payments).

- [REDACTED]
[REDACTED]
[REDACTED]; and
- dismiss the second superseding indictment.

Respectfully submitted,

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Counsel for Defendant **BURNETTE**

CERTIFICATE OF CONFERENCE

In accordance with the local rules, undersigned counsel conferred with counsel for the Government (Peter Nothstein, Esquire), and the Government indicated that it objects to this motion.

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.1(F), undersigned counsel certify that this document contains 7,643 words (per Word Perfect's word count).

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CERTIFICATE OF SERVICE

Undersigned counsel certify that on this 21st day of October, 2019, this document was hand delivered to all Tallahassee counsel of record and mailed (via U.S. mail) to all remaining counsel of record (as listed below).

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